IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1902.

BERT ROSS, *Appellant,* vs. MARTIN AGUIRRE, WARDEN OF THE STATE PRISON OF THE STATE OF CALIFORNIA AT SAN QUENTIN, CALIFORNIA, *Appellee.*	No. 228.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from an order of the Circuit Court of the United States for the Northern District of California, denying the petition of Bert Ross for a writ of habeas corpus.

The appellant presented a petition, (*fols.* 1 to 9,) alleging that he was restrained of his liberty by the appellee, as Warden of the State Prison of California, under a judgment of a State Court rendered without due process of law and in

violation of the fourteenth amendment to the Constitution of the United States, and setting forth the facts relied on. The court denied the petition (*fol.* 10) on the ground that application for relief on behalf of petitioner should first be made to the courts of the State of California.

A petition for habeas corpus on behalf of the appellant, on the same grounds, (*fols.* 11 to 21) was thereupon presented to the Supreme Court of the State of California, which was (*fol.* 19) denied by that court without assigning any reason. An application (*fols.* 22 to 23) was thereupon made to the Chief Justice of that court for a writ of error to this Court, which (*fol.* 22) was likewise denied.

Thereupon (*fol.* 25) the appellant filed in said Circuit Court a certified copy of the record of said proceedings in the Supreme Court of California, and asked leave to renew his application for habeas corpus. Leave being so granted, the petition was again submitted and denied, (*fol.* 25,) and an appeal to this Court (*fols.* 25 to 27) was allowed. No reason was assigned by the court for the denial of the petition.

The facts alleged in the petition, and relied on by appellant for the issuance of the writ prayed for, are as follows:

Section 8 of Article I of the Constitution of the State of California, adopted May 7, 1879, is as follows:

> "Sec. 8. Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a

magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law. A grand jury shall be drawn and summoned at least once a year in each county."

On March 24, 1893, and for many years prior thereto, there was in force in the State of California, a statute known as the Code of Civil Procedure, which provided, in sections 204 to 211 inclusive, the manner of selecting and returning the names of persons to serve as trial jurors and grand jurors, in civil and criminal cases. Those sections are as follows:

"Sec. 204. In the month of January in each year, it shall be the duty of the superior court in each of the counties of this state to make an order designating the estimated number of grand jurors, and also the number of trial jurors, that will, in the opinion of said court, be required for the transaction of the business of the court, and the trial of causes therein, during the ensuing year; and immediately after said order shall be made, the board of supervisors shall select, as provided in the next section, a list of persons to serve as grand jurors, and also a list of persons to serve as trial jurors, in the superior court of said county, during the ensuing year, or until new lists of jurors shall be provided. In cities and counties having over one hundred thousand inhabitants, such selection shall be made by the judges of the superior court, or a majority of them if all do not attend."

"Sec. 205. They shall proceed to select and list the grand jurors required by said order of the superior

court, and then select and list the trial jurors required by said order. Said selections and listings shall be made of persons suitable and competent to serve as jurors, who are assessed on the last preceding assessment roll of such county, or city and county; and in making such selections they shall take the names of such only as are not exempt from serving, who are in possession of their natural faculties, and not infirm or decrepit, of fair character and approved integrity, and of sound judgment."

"Sec. 206. The list of jurors, to be made as provided in the preceding section, shall contain the number of persons which shall have been designated by the court in its order. The names for such lists shall be selected from the different wards or townships of the respective counties in proportion to the number of inhabitants therein, as nearly as the same can be estimated by the persons making said lists; and said lists shall be kept separate and distinct one from the other."

"Sec. 208. Certified lists of the persons so selected to serve as grand jurors and as trial jurors shall at once be placed in possession of the county clerk."

"Sec. 209. On receiving such lists the county clerk shall file the same in his office, and write down the names contained thereon on separate pieces of paper, of the same size and appearance, and fold each piece so as to conceal the name thereon. He shall deposit the pieces of paper having on them the names of the persons selected to serve as grand jurors in a box to be called the 'grand jury box', and those having on them the names of the persons selected to serve as trial jurors in a box to be called the 'trial jury box'."

"Sec. 210. The persons whose names are so returned shall be known as regular jurors, and shall serve for one year and until other persons are selected and returned."

"Sec. 211. The names of persons drawn for grand jurors shall be drawn from the 'grand jury box', and the names of persons for trial jurors shall be drawn from the 'trial jury box'; and if, at the end of the year, there shall be the names of persons in either of the said jury boxes who may not have been drawn during the year to serve, and have not served as jurors, the names of such persons may be placed on the list of jurors drawn for the succeeding year."

Sections 241 and 242 of the same Code provided the method of drawing and impaneling a grand jury. That method consists substantially in the clerk, in the presence and by order of the court, drawing by lot, from the grand jury box provided in said section 211, the names of nineteen of the persons so selected to serve as grand jurors, which nineteen persons constitute the grand jury.

There was, at the same times and ever since, another statute, called the Penal Code,—sections 894 to 927 of which prescribe the powers and duties of a grand jury and the grounds of and procedure upon challenge to the panel or to an individual grand juror,—and by section 917 thereof an indictment is defined as "an accusation in writing, pre-" sented by the grand jury to a competent court, charging " a person with a public offense."

It is the law of the State of California, that the *method* prescribed by law for drawing and impaneling a grand jury

is *jurisdictional,* and must be strictly followed; and that a body, not so drawn and impaneled, is not a grand jury, an indictment found by it is *void,* no court has any *jurisdiction* to try a person on such an indictment, and all proceedings founded upon it are void.

Bruner v. *Superior Court,* 92 Cal. 239.

On March 23, 1893, the legislature of the State passed an Act, (*Stats. Cal.* 1893, p. 297,) entitled as follows: "An "Act to amend sections 204, 205, 206, and 208 of the Code "of Civil Procedure;" and no other Act attempting to amend either of the sections we have quoted has been passed.

It is the law of the State of California, that an Act with only such a title as the foregoing is unconstitutional and void under the Constitution of that state.

Lewis v. *Dunne,* 134 Cal. 291.

Those attempted amendments were therefore void and ineffectual; and the sections we have quoted remain the law of that state.

It is also the law of the State of California that there is no remedy by appeal, under the statutes of that state, for the illegal selection or drawing of a grand jury; the only remedies being prohibition or habeas corpus.

Bruner v. *Superior Court,* 92 Cal. 239.

On January 28, 1899, the Judge of the Superior Court of the County of San Luis Obispo, California, made an order for the drawing of a grand jury for that court for the

year 1899; and thereupon that court impaneled a body which it called a grand jury, drawn solely from names selected by the Judge himself, and not from any names or list of names selected by the Board of Supervisors of the county, as required by the sections we have quoted. (*Fols.* 5 to 7½, pages 4 to 5.) The body so drawn and impaneled returned an indictment against this appellant for the crime of murder, upon which indictment he was tried and convicted and sentenced to death; and he was not tried or convicted upon any other indictment, nor upon any information. (*Fols.* 3, 4, 7.)

Under that conviction and sentence, and a commitment issued thereon, and not under any other authority, the appellee, as such Warden, holds the appellant in custody, and, will, if the appellant be not sooner discharged from his custody, take his life.

In stating the foregoing facts, it has been necessary, for the sake of clearness, to state some matters of law. Those statements will be verified in the course of our argument.

On this case, we contend:

1. That "due process of law," upon which a person may be deprived of life or liberty, cannot be had without *some* proceedings under *some* law prescribed by the supreme authority in the state; that if the state has prescribed the law under which such deprivation may be had, any such deprivation had without the authority of that law, is "with-" out due process of law"; that if such unlawful deprivation

is accomplished by the judgment of a court of the state, otherwise competent, or by an officer of the state under color of the authority of the state, it is committed by the state itself.

2. That, if the sections we have quoted are the law of the state, the judgment of conviction and commitment under which appellant is held are void and of no effect, and do not constitute due process of law under which he may lawfully be restrained of his liberty.

3. That appellant has not been afforded any remedy by appeal, and habeas corpus is the proper remedy.

4. That the sections we have quoted constitute the sole law of the State of California under which a grand jury may be constituted.

ASSIGNMENTS OF ERROR.

(Transcript, *fols.* 28-29.)

And now, on the 6th day of January, 1902, comes the said petitioner, by William Graves, his attorney, and says that the order in said cause, denying his application for a writ of habeas corpus, is erroneous and against the just rights of said petitioner for the following reasons:

1. Because it appears by his petition herein that he is entitled to a writ of habeas corpus from this Court.

2. Because it appears by said petition that no indictment by any grand jury was ever found or returned against the said petitioner.

3. Because the superior court of the County of San Luis Obispo, State of California, had no jurisdiction to try the said petitioner upon the indictment mentioned in the record herein, for the reason that said indictment was not found by any grand jury selected according to law.

4. Because the judgment of said superior court convicting the said petitioner upon said pretended indictment is void, and did not constitute due process of law by which the said petitioner could lawfully be deprived of his liberty or life, for the reason that said superior court had no jurisdiction to try the said petitioner upon said pretended indictment.

5. Because, by the law of the State of California, the said petitioner had no remedy in that behalf by appeal.

6. Because the said petitioner did duly apply to the su-

preme court of the said State of California for a writ of habeas corpus, for the reasons and on the grounds set forth in his petition herein, and the said supreme court of the State of California refused to issue said writ; whereupon said petitioner duly applied to the chief justice of said court to allow a writ of error to the Supreme Court of the United States from said order refusing to issue said writ of habeas corpus, but the said chief justice refused to allow said writ of error; and petitioner has no other remedy in the courts of said state.

ARGUMENT.

I.

IF APPELLANT IS IN CUSTODY BY AUTHORITY OF A STATE, BUT WITHOUT THE AUTHORITY OF ANY *LAW* OF THE STATE, HE IS IN CUSTODY IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

Where a person, confined under color of process from a state court, applies to a Federal court to be released from that confinement, he must, of course, show that such confinement is in violation of the Constitution or laws of the United States. This, however, he sufficiently does when he shows that he is deprived by the state of his liberty without due process of law. The questions to be first determined in this case are, therefore, whether such proceedings as we complain of here constitute due process of law, and whether it is the state which is depriving the appellant of his liberty.

The questions which have been discussed under this constitutional provision, have usually been as to the validity of some statute of the state; but such inquiries do not exhaust the scope of the constitutional prohibition. The *statutes* of a state may be unexceptionable; but if the state, in disobedience to its own statutes, and without the authority of any law, deprives a person of his liberty, it cannot defend its unlawful acts by saying that it has enacted laws which, if obeyed, would have secured protection to him. The constitution, like the famous provision of Magna Charta, was

intended primarily as a safeguard against the exercise of arbitrary power. "Due process of law is process due ac- " cording to the law of the land, . . . regulated by the law " of the state"; and a trial, to be valid, must be had "accord- " ing to the settled course of judicial proceedings".

Walker v. *Sauvinet,* 92 U. S. 90.

It is, of course, true that, where the state has provided valid laws, but a court of that state, "acting within its juris- " diction", erroneously fails to follow that law, that error must be corrected, if at all, in the ordinary course of judicial proceedings; and it cannot be said that due process of law has not been had. But if that court has no authority, under any valid law of the state, to try the case at all, its judgment is simply void and does not constitute due process of law. If a person be deprived of liberty by such a judgment, he is so deprived *by the state,* whose court is exercising a power which can be exercised only by the state. It is therefore settled that a person deprived of his liberty by the judgment of a state court, *void* for any reason, may, under this constitutional provision, be discharged by a Federal court on habeas corpus.

Ex parte Nielson, 131 U. S. 176;
In re Mayfield, 141 U. S. 107, 116;
Ex parte Ulrich, 42 Fed. 587;
Ex parte Kelly, 46 Fed. 653;
Ex parte Glenn, 111 Fed. 257.

If, then, we can show that the judgment under which the appellant is detained, is, when tested by the law of the state,

coram non judice and void, he will be entitled to his discharge under this writ. This we shall endeavor to establish under the next head.

II.

THE JUDGMENT UNDER WHICH APPELLANT IS DETAINED IS VOID AND OF NO EFFECT UNDER THE LAW OF THE STATE OF CALIFORNIA, AND HE IS THEREFORE DEPRIVED OF HIS LIBERTY BY THE STATE WITHOUT DUE PROCESS OF LAW.

We have quoted at large, in our statement of the case, the sections of the California Code of Civil Procedure which provide the system for the selection of grand jurors and the impanelment of grand juries. That system is, in brief, that the persons to serve as grand jurors must be selected by the *Board of Supervisors* of the county, and that the Superior Court, when calling a grand jury, shall draw, by lot, nineteen names from the list of names so selected by that board, which nineteen persons shall constitute the grand jury.

We have also quoted the section of the Constitution of that state, which, as interpreted by the highest court of the state, provides that "no person can be held to answer for "crime, unless on information, after examination and com- "mitment by a magistrate, or an indictment by a grand "jury".

Bruner v. *Superior Court*, 92 Cal. 239, 249.

As the appellant here was never examined or committed by a magistrate, and no information was filed against him,

this case must rest on the indictment by the alleged "grand jury".

As we have shown, the Superior Court, instead of obeying this law, impaneled a grand jury drawn from a list of names selected *by the Judge himself,* and not by the Board of Supervisors; and appellant was tried, and the judgment in question was rendered, solely upon an indictment returned by the body so impaneled. (*Fols.* 6 to 7.) That body, not being composed of persons selected as required by law, was not a "grand jury", and had no jurisdiction to indict any one.

A grand jury impaneled without authority of law is an illegal body, and an indictment found by it is simply a nullity. No court has jurisdiction to try a person on such an indictment, and a judgment rendered thereon is void in the extreme sense.

Ex parte Farley, 40 Fed. 66;
U. S. v. *Dixon,* 44 Fed. 401;
Ex parte Reynolds, 35 Tex. Cr. 437.

Such is, in particular, the law of the State of California.

Bruner v. *Superior Court,* 92 Cal. 239.

In that case, the Supreme Court of California held that the Superior Court had no authority of law to impanel a grand jury in part from persons summoned by an elisor (the sheriff not being disqualified); that an indictment found by that grand jury was a *nullity;* that the Superior Court had no *jurisdiction* to try anyone on that indictment; and that any judgment it might render would be *void.* Ac-

cordingly, a writ of prohibition was granted restraining the Superior Court from trying the person so indicted. In the opinion of that court in that case, the whole subject is fully discussed, and we need add nothing to what was there said.

Tested by the rule laid down in those decisions, the judgment under which the appellant is detained is absolutely void, and does not constitute due or any process of law under which he can be restrained of his liberty,—least of all under which he can be put to death.

III.

UNDER THE LAW OF THE STATE OF CALIFORNIA, APPELLANT HAS NO REMEDY BY APPEAL; AND HABEAS CORPUS IS THEREFORE A PROPER REMEDY.

The judgment under which appellant is held being, as we have shown, void for want of jurisdiction, there would seem no doubt of the power of the courts of the United States to release him on habeas corpus. Nevertheless, as this Court has said that application for relief in such cases ought first to be made to the courts of the state, we shall proceed to show that appellant did duly apply to the highest court of the State of California for the only relief furnished him by the laws of that state.

Under the law of California, the objection here made to the authority of the grand jury, is not one which can be raised upon appeal, nor can a judgment of conviction be reviewed on appeal on that ground.

Bruner v. *Superior Court*, 92 Cal. 239, 252, and cases there cited.

The appellant here could therefore obtain no remedy by appeal in the courts of that state; and he was compelled to resort to habeas corpus. He duly applied to the Supreme Court of the State for that writ, but that court refused to issue it upon that application. No reason was given for that refusal, and we are left to conjecture the ground on which that court failed to afford a remedy sanctioned by the law of that state and the solemn decisions of the court itself. We were also denied a writ of error to this court; and, by reason of the early date set for the execution of appellant, we had no opportunity to apply to a justice of this Court for that writ. We therefore, having done all we could to obtain relief from the courts of the state, are now entitled to have that relief from the courts of the United States.

IV.

THE LAW OF CALIFORNIA, AS TO THE SELECTION OF GRAND JURIES, IS AS SET FORTH IN THIS BRIEF.

In the preceding portions of this argument, we have assumed that sections 204 to 211, inclusive, of the Code of Civil Procedure of California, as quoted in our statement of the case, constitute the law of that state as to the selection and impanelment of grand juries; and, if that assumption be correct, we think that the conclusions we have drawn necessarily follow. But, as an attempt was made by the legislature to amend certain of those sections, it remains to show that that attempt was ineffectual, and that those sec-

tions remain unamended. Such *is* the condition of the state law, because the amendatory act was void under the Constitution of the state.

Section 24 of Article IV of the Constitution of California provides, among other things, that "Every act shall embrace "but one subject, which subject shall be expressed in its "title"; and section 22 of Article I declares that "The "provisions of this constitution are mandatory and prohib- "itory, unless by express words they are declared to be "otherwise." Under these provisions, it is uniformly held by the Supreme Court of that state that an Act, the subject of which is not expressed in its title, is unconstitutional and void.

As we have said, the title of the act in question (*Stats. Cal.* 1893, p. 297) is as follows: "An act to amend sections "204, 205, 206, and 208 of the Code of Civil Procedure."

It was held in *People* v. *Parvin,* 74 Cal. 549, that an Act with such a title, but purporting to amend *only one section* of that Code, was valid. That decision was rendered by a bare majority of a divided court. But, in the recent case of *Lewis* v. *Dunne,* 134 Cal. 291, the former case was, if not expressly overruled, at least limited, and held not to be authority for upholding such a title when not confined *to a single section.* In the latter case, it was held that a reference, in the title of an amendatory Act, to the "Code of "Civil Procedure," without any further expression of the subject, was insufficient, and that, (unless, perhaps, in the case of an Act amending *only one section,*) an Act with a title such as the one here in question, is unconstitutional and

void. The opinion in that case is long; but a few extracts will make its meaning plain. The court, after holding the Act there in question to be void for another reason, said:

"But if the invalidity of the act for the reason above given could by any recondite, indirect, and abstruse reasoning be explained away, it is just as clear that the act is void for want of compliance with the other constitutional provisions, that 'every act shall have but one subject, which subject shall be expressed in its title.' It is apparent that the language of the title of the act in question, in and of itself, expresses no subject whatever. No one could tell from the title alone what subject of legislation was dealt with in the body of the act; such subject, so far as the title of the act informs us, might have been entirely different from anything to be found in the act itself. This, of course, would be admitted, except for the claim that although the title does not, as an independent instrument, express any subject, yet it does so by 'reference'.

"It may be conceded that where the title of an act clearly expresses a definite subject, then the title of an act amendatory thereof may be helped out by reference to the title of the original act,—the title of the original act, which does express a subject, being incorporated into and published as part of the title of the amendatory act. But, in the case at bar, how does the reference in the title help its failure to otherwise express the subject? The reference is, really, not to the title of any former act; it is merely to 'the Code of Civil Procedure of the state of California'. Now, what is the Code of Civil Procedure? It is merely a name given to a large part of the general laws of the state. The part of the great body of our laws which is to be found under that name

is not confined to any particular subject or subjects, but includes substantive law, criminal law, and legislation, that might be properly classed under any category whatever,—as well as 'civil procedure'. Nearly all of our general laws are arranged, for convenience, under four main headings, or names,—to wit, the Civil Code, the Code of Civil Procedure, the Penal Code, and the Political Code,—but no one of these codes is complete in itself; legislation under either code is inseparably interwoven with legislation under the others; and legislation upon any imaginable subject would not be held invalid because found in any particular code. . . .

"The decisions in California on this subject are not directly determinative of the question presented in the case at bar. The sufficiency of such a title as is here involved has never been presented to this court. *People* v. *Parvin,* 74 Cal. 549, is the only case here that can be at all insisted upon as supporting the respondent's contention. The title under consideration there was this: 'An act to amend section 3481 of the Political Code'. It referred to *one single section,* and named it. The almost universal custom of the legislature, in the numerous amendments which it has made to the codes, has been to put into the title of the amendatory act, after the number of the section, additional words expressing the subject of the act,—as, for instance, 'relating to the writ of prohibition', 'relating to the lien of mechanics and others', etc. In a very few instances —not more than two or three having been called to our attention—the additional explanatory words have been omitted, and one of these was involved in *People* v. *Parvin,* 74 Cal. 549. A bare majority of the court—two justices dissenting and one not participating—held

that the title was sufficient; but if we accept the decision as sound, it goes no further than to hold that the title of an act amending a *single* section of a code is sufficient, if it directly refers to the section and designates it by its number. . . .

"Our conclusion is, that, for the reasons above stated, the said act of March 8, 1901, is unconstitutional, and void for all purposes, and is inoperative to change or in any way affect the law of the state as it stood immediately before the approval of said act."

Under the rule laid down in that case, the amendatory Act here in question is unconstitutional and void; and the sections in question remain as quoted in our statement, notwithstanding those attempted amendments. The judgment of conviction of appellant was therefore, as we have shown, void.

It is provided, in section 755 of the Revised Statutes, that the court to which application is made for a writ of habeas corpus, *shall* forthwith award such writ, "unless it appears "from the petition itself that the party is not entitled "thereto." As the court below did not suggest any defect in the petition in this case, nor assign any reasons for not issuing the writ, we can only say that, if the argument in this brief is correct, that petition is sufficient and the writ should have been granted.

We therefore respectfully submit that the order appealed from should be reversed.

W. C. VAN FLEET and
W. B. TREADWELL,
For Appellant.